

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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MICHAEL D. SMITH,

Petitioner,

v.

ROBERT LEGRANDE, et al.,

Respondents.

Case No. 2:12-cv-01260-MMD-RJJ

ORDER

This habeas matter under 28 U.S.C. § 2254 comes before the Court on petitioner's application to proceed *in forma pauperis* (dkt. no. 1) and for initial review under Rule 4 of the Rules Governing Section 2254 Cases. The Court finds that petitioner is unable to pay the filing fee, and the pauper application therefore will be granted. On initial review, a substantial question exists as to whether the petition is subject to dismissal because none of the claims in the petition have been fairly presented to the state supreme court and exhausted. Petitioner therefore will be directed to show cause in writing why the petition should not be dismissed without prejudice for lack of exhaustion.

I. BACKGROUND

According to the papers presented and the records of the state courts, petitioner Michael Duane Smith seeks to set aside his August 6, 2010, Nevada state conviction, pursuant to a guilty plea, of home invasion, in No. 10C264716. Petitioner was

1 sentenced to 48 to 120 months, with credit for 93 days served. Petitioner did not file a
 2 direct appeal, but he did file a timely state post-conviction petition on or about February
 3 15, 2011. The state district court denied relief in an order filed on or about November
 4 16, 2011. Petitioner's December 29, 2011, appeal from the denial of his first state
 5 petition was dismissed for lack of jurisdiction as untimely by the Nevada Supreme Court
 6 on February 24, 2012, in No. 60125. A second April 17, 2012, notice of appeal from the
 7 same November 16, 2011, order also was dismissed for lack of jurisdiction as untimely
 8 by the Nevada Supreme Court on May 17, 2012, in No. 60696.¹

9 Meanwhile, petitioner filed a second state petition on or about April 18, 2012.
 10 The state district court issued a written order on or about July 5, 2012, denying the
 11 petition as untimely and successive. It does not appear that an appeal has been taken
 12 as yet from the denial of the second petition. Moreover, and any proceedings on a
 13 timely appeal to the Nevada Supreme Court would not have been concluded in the
 14 relatively short interval of time between the issuance of the state district court's order
 15 (July 5, 2012) and petitioner's filing of his federal petition (July 16, 2012).

16 **II. GOVERNING LAW**

17 The Court may raise issues of exhaustion *sua sponte*. See, e.g., *Aiken v.*
 18 *Spalding*, 841 F.2d 881, 883 (9th Cir. 1988). Under 28 U.S.C. § 2254(b)(1)(A), a habeas
 19 petitioner first must exhaust his state court remedies on a claim before presenting that
 20 claim to the federal court. To satisfy this exhaustion requirement, the claim must have
 21 been fairly presented to the state courts completely through to the highest court
 22 available, in this case the Supreme Court of Nevada. E.g., *Peterson v. Lampert*, 319

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 25 ¹The Court may take judicial notice of undisputed matters of public record,
 26 including documents on file in federal or state courts. E.g., *Harris v. County of Orange*,
 27 ___ F.3d ___, 2012 WL 2060666, slip op. at *4 (9th Cir., June 8, 2012). The online
 28 docket records of the state district court and Nevada Supreme Court may be accessed
 from:

<https://www.clarkcountycourts.us/Anonymous/default.aspx>
<http://www.nevadajudiciary.us/index.php/supremecourt>

1 F.3d 1153, 1156 (9th Cir. 2003) (*en banc*); *Vang v. Nevada*, 329 F.3d 1069, 1075 (9th
 2 Cir. 2003). In the state courts, the petitioner must refer to the specific federal
 3 constitutional guarantee and must also state the facts that entitle the petitioner to relief
 4 on the federal constitutional claim. *E.g.*, *Shumway v. Payne*, 223 F.3d 983, 987 (9th Cir.
 5 2000). That is, fair presentation requires that the petitioner present the state courts with
 6 both the operative facts and the federal legal theory upon which his claim is based.
 7 *E.g.*, *Castillo v. McFadden*, 399 F.3d 993, 999 (9th Cir. 2005). The exhaustion
 8 requirement ensures that the state courts, as a matter of federal-state comity, will have
 9 the first opportunity to pass upon and correct alleged violations of federal constitutional
 10 guarantees. *See, e.g.*, *Coleman v. Thompson*, 501 U.S. 722, 731(1991).

11 A petition that is completely unexhausted is subject to immediate dismissal.
 12 *See, e.g.*, *Rasberry v. Garcia*, 448 F.3d 1150, 1154 (9th Cir. 2006); *Jiminez v. Rice*, 276
 13 F.3d 478, 481 (9th Cir.2001).

14 **III. DISCUSSION**

15 Petitioner has not presented any claims to the Supreme Court of Nevada in a
 16 procedural context in which the merits of any claim would be or could be considered.
 17 He did not file a direct appeal from his criminal conviction. He did not timely appeal the
 18 denial of his first state post-conviction petition, and the Supreme Court of Nevada did
 19 not have jurisdiction to consider the merits of any claims on his two untimely appeals.
 20 Nor has he appealed the denial of his second state petition as yet.

21 As noted, petitioner must present his claims all the way through to the Supreme
 22 Court of Nevada in order to exhaust the claims. Presenting a claim in a procedural
 23 context in which the merits of the claim will not be considered, or will be considered only
 24 in special circumstances, does not constitute fair presentation of the claim for purposes
 25 of exhaustion. *E.g.*, *Castille v. Peoples*, 489 U.S. 346, 351 (1989). Petitioner's two
 26 untimely appeals did not fairly present any claims to the Supreme Court of Nevada for
 27 purposes of exhaustion because that court did not have jurisdiction over the untimely
 28 appeals. Petitioner thus has not exhausted any claim as yet.

1 Petitioner therefore must show cause in writing why the petition should not be
2 dismissed as completely unexhausted. The petition will be dismissed without further
3 advance notice if petitioner does not timely respond to this order or fails to demonstrate
4 that the action should not be dismissed without prejudice for lack of exhaustion.
5 Nothing herein signifies either that the claims in the federal petition correspond to any
6 particular claim in the state court proceedings or that the petition otherwise is free of
7 deficiencies.

8 The Court will hold the motion for appointment of counsel under submission
9 pending resolution of the exhaustion inquiry. Petitioner should note that the handwritten
10 memorandum submitted with the motion for appointment of counsel stops in mid-
11 sentence at the end of page 5. If petitioner wishes to submit further argument in
12 support of the motion, he should file a separate and complete supplemental
13 memorandum in support of the motion. The Court does not find in the interim that the
14 interests of justice require the appointment of counsel under 18 U.S.C. § 3006A(a)(2)(B)
15 pending resolution of the show-cause inquiry, as petitioner has demonstrated an
16 adequate ability to articulate his position in relation to the exhaustion issue presented.
17 The Court's decision in *Koerschner v. Warden*, 508 F.Supp.2d 849 (D.Nev. 2007), does
18 not hold that counsel should be appointed in every habeas action pursued by an inmate
19 incarcerated at Lovelock Correctional Center. See 508 F.Supp.2d at 861-62.

20 IT IS THEREFORE ORDERED that petitioner's application to proceed *in forma*
21 *pauperis* (dkt. no. 1) is GRANTED, such that petitioner shall not be required to pay the
22 \$5.00 filing fee, and that the Clerk of Court shall file the petition.

23 IT IS FURTHER ORDERED that, within thirty (30) days of entry of this order,
24 petitioner shall SHOW CAUSE in writing why the petition should not be dismissed
25 without prejudice for lack of exhaustion. Petitioner shall attach with his response copies


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1 of all state court filings upon which he relies to establish that the exhaustion requirement
2 has been satisfied as to the claims in the federal petition.

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4 DATED THIS 19th day of July 2012.

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UNITED STATES DISTRICT JUDGE